Supreme Court, U.S.
FILED
AUG 28 2001
OFFICE OF THE CLERK

No. 01-81

IN THE

Supreme Court of the United States

ERIC B. RYAN and HILLARY A. RYAN,

Petitioners,

v.

JENIA ANNE JOSEPHINE JOHNSON and THOMAS J. BITAR, Guardian *ad litem*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

Page

Table of Cited Authorities ii

Point I:

The New Jersey Supreme Court Did Not Hold That The Petitioners' Challenge Was Barred By Any Limitations Period Established By The New Jersey Parentage Act 2

Point II:

Because This Case Involves A Violation Of Procedural Due Process, It Is Not Governed By The Principles Of Substantive Due Process Enunciated In *Michael H.* 6

Conclusion 10

TABLE OF CITED AUTHORITIES

Page

Cases:

Baker v. General Motors Corporation, 522 U.S. 222 (1998) 8

Bank of Marin v. England, 385 U.S. 99 (1966) ... 9

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) 8

City of New York v. New York, N.H. & H.R. Co., 344 U.S. 293 (1953) 9

Hansberry v. Lee, 311 U.S. 32 (1940) 8, 9

In re Coe, 42 N.J. 485, 201 A.2d 571 (1964) 3

In Re Hosford's Estate, 26 N.J. Super. 412, 98 A.2d 332 (App. Div. 1953) 5

In re Thompson, 53 N.J. 276, 250 A.2d 393 (1969) 3

In re Wehrhane's Estate, 23 N.J. 205, 128 A.2d 681 (1957) 3

Martin v. Wilks, 490 U.S. 755 (1989) 8

Michael H. v. Gerald D., 491 U.S. 110 (1989) ..1, 6, 7, 9

Cited Authorities

	Page
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)	9
Richards v. Jefferson County, 517 U.S. 793 (1996)	8, 9
Shammas v. Shammas, 9 N.J. 321, 88 A.2d 204 (1952)	5
Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988)	9
Wingate v. Estate of Ryan, 149 N.J. 227, 693 A.2d 457 (1997)	2, 3, 4
Statutes:	
N.J.S.A. 3:5-10	2
N.J.S.A. 9:17-38 *et seq.*	3
N.J.S.A. 9:17-43(b)	6
N.J.S.A. 9:17-45(b)	2, 3
Rules:	
N.J. Evid. Rule 803	7
N.J. Evid. Rule 804	7

Respondents Jenia Anne Johnson and Thomas Bitar contend that this case does not present the fundamental issue of procedural due process identified by the petitioners Eric B. Ryan and Hillary A. Ryan.

They base this contention on two assertions. *First*, they assert that the New Jersey Supreme Court rested its decision on an alternative independent basis, namely, that the challenge to Jenia's paternity was untimely under the New Jersey Parentage Act. *Second*, they assert that New Jersey law as construed by the New Jersey Supreme Court below creates a substantive rule of law of the type upheld by this Court in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

The first assertion is simply a mischaracterization of the holding of the New Jersey Supreme Court below. The second assertion misstates New Jersey law as set forth, *inter alia*, by the New Jersey Supreme Court below, and misapplies the principles of substantive due process enunciated in *Michael H.* to a situation in which it is fundamental principles of procedural due process that have been violated. Petitioners shall address each of respondents' points.

POINT I

THE NEW JERSEY SUPREME COURT DID NOT HOLD THAT THE PETITIONERS' CHALLENGE WAS BARRED BY ANY LIMITATIONS PERIOD ESTABLISHED BY THE NEW JERSEY PARENTAGE ACT

Respondents assert that the New Jersey rested its decision on an alternative independent basis, namely, that the challenge to Jenia's paternity was untimely under the New Jersey Parentage Act.[1]

An examination of the opinion the Supreme Court demonstrates that this assertion is not true.[2] After reciting

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1. Respondents assert that the New Jersey Supreme Court held that "any contest over parentage had to be pursued, if at all, under the Parentage Act." The New Jersey Supreme Court made no such ruling in the case the case below. In *Wingate v. Estate of Ryan*, 149 N.J. 227, 238, 693 A.2d 457, 463 (1997), the New Jersey Supreme Court specifically held that parentage can be determined under the New Jersey Probate Act. The Probate Act specifically provides that courts may determine parentage in probate proceedings, although they are to utilize the legal standards specified in the Parentage Act. N.J.S.A. 3:5-10.

2. In support of this assertion, respondents claim that the New Jersey Supreme Court "reinstat[ed] the result and conclusion of the trial court." Resp. Brf. at 8. This claim is manifestly untrue. In granting summary judgment dismissing the Ryans' challenge to Jenia's status as member of the class of beneficiaries of the trust, the trial court specifically held that their challenge was not foreclosed by the 1965 divorce decree because they had not been a parties to that proceeding. Trial Op. at. 12; App. 100. Rather, the trial court granted summary judgment on the grounds that the challenge was barred by the limitations provision of the New Jersey Parentage Act, N.J.S.A. 9:17-45(b). Trial Op. at pp. 19-25, App. 108-111.

(Cont'd)

the procedural and factual background to the case[3], the court began Part II(A) of its opinion with a recital of the common law presumption in favor the legitimacy of a child born within wedlock. 166 N.J. at 350; 765 A.2d at 752. It then proceeded to discuss the status of that presumption in light of the policies underlying the New Jersey Parentage Act, N.J.S.A. 9:17-38 *et seq.* It reviewed the provisions of the Parentage Act, including the limitations provision, N.J.S.A. 9:17-45(b). It concluded that the Parentage Act embodies a policy of fostering the parent-child relationship, which should guide the court, especially in cases where both parents have acknowledged the father's paternity in the context of a judicial proceeding and "the issue has been conclusively adjudicated." 166 N.J. at 352; 765 A.2d at 752.

In part II(B) of its opinion, the court then reviewed the recent amendments to the Parentage Act and its own recent opinion in *Wingate v. Estate of Ryan*, 149 N.J. 227, 693 A.2d

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(Cont'd)

The New Jersey Supreme Court did not adopt the trial court's view that the case was barred by the statutory limitations period; but, rather, held that the Ryans were bound by the divorce decree — a grounds that the trial court had specifically rejected.

3. In footnote 7 of their brief, respondents seek to renew before this Court an argument that they made unsuccessfully in the New Jersey courts, namely that the term "issue" as used in the trust document means something other than blood or biological issue. State law clearly does not support their position. *In re Wehrhane's Estate*, 23 N.J. 205, 128 A.2d 681 (1957). The holding in *In re Wehrhane's Estate* has been modified only to the limited extent that the New Jersey courts have since held that, as matter of public policy, this language is also deemed to includes children who are lawfully adopted. *In re Coe*, 42 N.J. 485, 201 A.2d 571 (1964); *In re Thompson*, 53 N.J. 276, 250 A.2d 393 (1969).

457 (1997). It concluded that the thrust of the statutory amendments and the *Wingate* opinion was to make it easier to establish paternity where it had not previously been established, not to make easier to attack a previous determination of paternity.

The court then proceeded to consider the application of the doctrine of "probable intent" to the present case. It held that the doctrine is not applicable where question of whether Jenia is the "issue" of Seward, Jr. has already conclusively been established as a matter of law by the divorce decree. The Court summarized its holding

> In sum, the 1965 adjudication of Seward Jr.'s paternity effectively bars this current challenge.

166 N.J. at 357; 765 A.2d at 755.

In Part III of its opinion, the court addressed and rejected the due process objections raised by the Ryans (and certain other parties). The court explicitly rejected the petitioners' due process arguments, declaring:

> . . . we see no violation of due process in foreclosing a third-party collateral attack on a longstanding paternity judgment.

166 N.J. at 362; 765 A.2d at 758

In Part IV of its opinion, the court again summarized its holding.

> We hold that no third party may collaterally attack Jenia's parentage as determined in Seward Jr.'s divorce proceeding.

166 N.J. at 363; 765 A.2d at 759.

Thus, as this traversal of the opinion below demonstrates, respondents' assertion that the New Jersey Supreme Court rested its decision on an alternative independent basis — namely, that the challenge to Jenia's paternity was untimely under the New Jersey Parentage Act — is simply a mischaracterization of the opinion below.

It should be noted that had this case been decided on the grounds that the limitations period expired in 1984, as respondents argued below, such a holding would itself raise issues of procedural due process quite as serious as those raised by the actual holding of New Jersey Supreme Court. As a matter of New Jersey law, petitioners would not have had standing to intervene in the original divorce proceeding or to participate in any way. *Shammas v. Shammas*, 9 N.J. 321, 88 A.2d 204 (1952). Moreover, because the issue of Jenia's status as a member of the beneficiary class of the 1961 Trust did not become ripe until the first trust distributions could be made, petitioners could not have initiated proceedings at any time within the purported limitations period. *In Re Hosford's Estate*, 26 N.J. Super. 412, 98 A.2d 332 (App. Div. 1953). Thus, such a holding would have had the effect of systematically foreclosing them from ever having their day in court.

POINT II

BECAUSE THIS CASE INVOLVES A VIOLATION OF PROCEDURAL DUE PROCESS, IT IS NOT GOVERNED BY THE PRINCIPLES OF SUBSTANTIVE DUE PROCESS ENUNCIATED IN *MICHAEL H.*

Respondents assert that this case is governed by the substantive due process principles enunciated by this Court in *Michael H.* In *Michael H.*, this Court held that constitutional principles of substantive due process do not bar a state from establishing as a substantive rule of law that a child born within wedlock is *per se* the lawful child of the husband. Having adopted such a substantive rule of law, a state may deem the paternity of child born within wedlock not to be an adjudicatory fact to be contested in litigation, regardless of how compelling the evidence might be that the child is not in fact the biological child of the husband.

Contrary to the suggestion of respondents, New Jersey has not adopted any such *per se* substantive rule. Rather, in New Jersey law, there is merely a rebuttable presumption that the husband is the father a child born within wedlock. Paternity has been and remains an factual issue subject to adjudication. Indeed, the opinion of the New Jersey Supreme Court below specifically reaffirmed this legal standard under New Jersey law. It characterized the presumption as " one of the strongest *rebuttable* presumptions known to law." 166 N.J. at 353; 765 A.2d at 753 (emphasis added). It noted that this legal standard has expressly been incorporated into the New Jersey Parentage Act, N.J.S.A. 9:17-43(b), which provides that the presumption "may be *rebutted* in an action only by clear and convincing evidence." 166 N.J. at 353; 765 A.2d at 753 (emphasis added).

Thus, the New Jersey Supreme Court did not bar the Ryans' challenge on the basis of the type of substantive rule of law considered in *Michael H.* Rather it barred their challenge by giving conclusive binding effect to the adjudication of the paternity in the 1965 divorce proceeding.[4] The question posed by the present case is whether the giving the 1965 decree binding effect on persons such as the Ryans — persons who were not parties to the divorce proceeding, were not in privity with any of the parties to that proceeding, did not receive notice of the proceeding, and, as a matter of New Jersey law, would not have had standing to participate in that proceeding — violates principles of procedural due process established by the federal Constitution..

Respondents suggest that under substantive due process principles enunciated in *Michael H,* New Jersey could establish a "substantive" rule giving conclusive binding effect to that decree, even against the Ryans. Resp. Brf. at p. 11. This would be a novel and extraordinary extension of the substantive due process principles enunciated in *Michael H.*

As outlined in the Petition for *Certiorari*, this argument conflicts with well-established principles of procedural due

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4. It should be emphasized that, but for the decision foreclosing this issue, the parties challenging the Jenia's status as a beneficiary of the trust presented proofs to the trial court that would certainly have defeated a motion for summary judgment. Respondents characterize these proofs as "scandalous," "hearsay," and "irrelevant." Resp. Brf. at 7 n.6. They are "scandalous" only in the sense that they describe matters that are distasteful and usually presented to the court only in the context of paternity cases. They were plainly admissible under N.J. Evid. Rules 803 and 804. Far from being irrelevant, these are precisely the types of proofs that courts have historically considered in adjudicating paternity in the absence of modern scientific tests.

process, which require that "one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996); *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); *Martin v. Wilks*, 490 U.S. 755, 761-762 (1989); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971); *Baker v. General Motors Corporation*, 522 U.S. 222, 237 n.11 (1998); *id.* at 246-51 (Kennedy, J., concurring).

Treating this as a substantive due process case, respondents argue that the New Jersey courts properly engaged in a balancing of the private interests involved. The principles of procedural due process enunciated in *Hansberry* and *Richards, however,* cannot be "balanced" away. However small a party's interest may be, he or she cannot be bound by a judgment in a proceeding to which he or she was not named as a party or was not served with process. *Richards*, 517 U.S. at 804-805.

Respondents seek to avoid application of this fundamental principle of procedural due process by characterizing the decision of the New Jersey Supreme Court declaring the 1965 divorce decree conclusively binding on non-parties as involving application of a "substantive rule of law." This Court, however, has consistently held that this fundamental principle of due process applies regardless of the vocabulary used to describe either the state court proceedings or the state rules giving binding effect to a prior decree. If the effect is to deny a party his or her own day in court on the basis of a judgment entered in proceedings to which he or she was not a party, fundamental principles of due process have been violated, regardless of vocabulary

employed to achieve or defend this result. *Richards v. Jefferson County*, 517 U.S. at 798; *Hansberry v. Lee*, 311 U.S. at 40.

Similarly, respondents seek to characterize divorce proceedings as "in rem" proceedings and to argue that, as such, they are outside the usual rules of procedural due process. Whether or not this characterization is accurate as matter of New Jersey law, this Court has consistently held that even proceedings that are essentially in rem and that establish rights good against the world are governed by fundamental principles of due process, including the right to notice and opportunity to be heard. *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988) (probate proceedings); *Bank of Marin v. England*, 385 U.S. 99 (1966) (bankruptcy proceedings); *City of New York v. New York, N.H. & H.R. Co.*, 344 U.S. 293 (1953) (same); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (trust proceedings).

Thus, contrary to the arguments of respondents, this case is not foreclosed by *Michael H.* but presents an important and novel[5] issue concerning the application of fundamental principles of procedural due process.

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5. The New Jersey Supreme Court acknowledged that it could find no reported case analogous to the present case. 166 N.J. at 358; 765 A.2d at 756. Although respondents assert that other state courts overwhelmingly reach the same result as the New Jersey Supreme Court, Resp. Brf. at 11 n.12, they canvass essentially the same cases discussed by New Jersey court. For the most part, the cases they cite involve expiration of statutes of limitations or state statutes conclusively deeming the husband the father of a child born in wedlock.

Respondents argue that the result reached by New Jersey Supreme Court represents desirable public policy. Petitioners do not dispute that the issue raised by this case is ripe with public policy significance. Petitioners respectfully urge, however, that public policy significance of the issue militates in favor of the Court's granting *certiorari*.

CONCLUSION

For all the foregoing reasons, as well as those set forth in their Petition for *Certiorari*, petitioners Eric B. Ryan and Hillary A. Ryan respectfully urge that the Court issue a writ of certiorari in this matter to the New Jersey Supreme Court.

Respectfully submitted,

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